Supreme Court, U. S.
FILED
OCT 15 1979
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

NO. 79-715

NATIONAL STUDENT FILM CORPORATION,
a California corporation,
Petitioner,

v.

FENSTER SCHOOL,
an Arizona corporation,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ARIZONA, DIVISION TWO

PETITION FOR WRIT OF CERTIORARI

LAW OFFICES OF KLEIN & KLEIN
DONALD S. KLEIN, ESQ.
100 North Stone Ave., Ste. 903
Tucson, Arizona 85701
Counsel for Petitioner

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IN THE
SUPREME COURT OF THE UNITED STATES
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NO. _____

NATIONAL STUDENT FILM CORPORATION,
a California corporation,
Petitioner,

v.

FENSTER SCHOOL,
an Arizona corporation,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ARIZONA, DISTRICT TWO

PETITION FOR WRIT OF CERTIORARI

The Petitioner, National Student Film Corporation, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeals of the State of Arizona, Division Two, entered in this proceeding on April 24, 1979.

OPINION BELOW

The opinion of the Court of Appeals of the State of Arizona, Division Two, was not reported. It appears in the Appendix hereto. A Petition for Review, filed by the Petitioner was denied by the Supreme Court of Arizona without opinion. A copy of the order denying review appears in the appendix hereto.

JURISDICTION

The opinion of the Court of Appeals of the State of Arizona, Division Two, was filed on April 24, 1979. A timely Motion for Rehearing was filed on May 9, 1979 and was denied by the Court of Appeals of the State of Arizona, Division Two, on June 13, 1979. A timely Petition for Review was filed by Petitioner on June 15, 1979 and denied by the Supreme Court of the State of Arizona on July 17, 1979. This Petition for Writ of Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257 (3).

QUESTION PRESENTED

Did not the decision of the State trial court, as affirmed on appeal, deprive Petitioner of due process of law in violation of the Fourteenth Amendment to the United States Constitution, when it struck Petitioner's answer as a sanction for the failure of Petitioner to produce previously requested documents where the failure to produce those documents was, in fact, not willful or in bad faith?

STATUTORY AND CONSTITUTIONAL PROVISION INVOLVED

Amendment XIV, United States Constitution, provides in pertinent part:

> " * * * no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

Rule 37 (b)(2), Arizona Rules of Civil Procedure, Volume 16 of the Arizona Revised Statutes Annotated, provides in pertinent part:

> "Sanctions by court in which action is pending. If a party . . . fails to obey an order to provide or permit discovery, including an order made under Subdivision (a) of this Rule or Rule 35 the court in which the action is pending may make such orders in regard to the order as are just, and among others the following:
>
> (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
>
> (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35 (a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or

both to pay reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust."

STATEMENT OF THE CASE

On August 4, 1975, Respondent filed a Complaint against Petitioner in Pima County, Arizona Superior Court. In part, the Complaint alleged that Petitioner and Respondent had entered into a contract whereby Respondent would allow Petitioner to film scenes of the movie, "The Trial of Billy Jack," at the Fenster School in return for which Respondent would receive screen credits in the film, subject to exhibition limitations. Respondent alleged, in part, that the contract had been breached because the screen credits were not given. Petitioner answered the Complaint and alleged, in part, that the alleged agent of Petitioner, with whom Respondent negotiated, had no authority to enter into the contract with Respondent and

that the alleged contract did not commit Petitioner to give screen credit to Respondent.

Trial was originally scheduled for December 8, 1976. Upon stipulation of the parties, it was continued until May 3, 1977.

The parties engaged in extensive discovery, including several sets of lengthy interrogatories and sixteen (16) depositions. More than two years after it commenced the action and less than thirty days before trial was scheduled to commence, on April 5, 1977, Respondent filed a Request for Production of Documents, pursuant to Rule 34, Arizona Rules of Civil Procedure. It sought, among other documents, any location contracts used in the filming of "The Trial of Billy Jack." Approximately one week after Respondent filed the Request to Produce, the president of Petitioner, in his deposition, stated that the requested documents either did not exist or would be virtually impossible to locate. Petitioner filed an objection to the Request to Produce and reiterated its position that the

documents either did not exist or would be virtually impossible to locate.

Thereafter, pursuant to Rule 37 (a), Arizona Rules of Civil Procedure, Respondent moved to compel discovery of the documents. Petitioner opposed that motion. Petitioner's opposition reiterated that the relevant documents either did not exist, were not within Petitioner's control, or would be virtually impossible to locate. In addition, Petitioner offered to allow Respondent to have access to every warehouse where the documents might be. On June 6, 1977, Petitioner was ordered to produce any location contracts, any documents showing the amount of money Petitioner received as a result of the distribution of the movie and any documents indicating the number of people who saw the movie.

Since those documents were not provided, on August 4, 1977, counsel for Respondent wrote to counsel for Petitioner requesting production of the documents. He received no reply from counsel for Petitioner. Approximately two months later, counsel for Petitioner was permitted to withdraw on a

motion supported by his affidavit which stated in part that Petitioner failed to produce the documents ordered by the court. It was not until February 2, 1978, that new counsel appeared to represent Petitioner.

During the interim, the president of Petitioner filed a request for a continuance in court which showed that Petitioner had searched for the documents and could not locate them. The request stated, in part:

> "In fact, the company had searched diligently for all the materials requested by the Court, and they simply are not in existance [sic], and cannot be produced. Our previous attorney failed to inform the Court of that fact, and has opened the door for an unfair motion for judgement [sic] by Mr. Figliulo [counsel for Respondent]. We are prepared to produce signed statements showing that there has been an exhaustive search and no such documents as requested by the Plaintiff and ordered by the Court, in fact exist."

Although new counsel appeared in February, 1978, to represent Petitioner, the entire file was not delivered by previous counsel to the new attorneys until the beginning of May, 1978. On April 11, 1978, counsel for Respondent wrote to counsel for Petitioner concerning the requested documents. That was the first time that Petitioner's new counsel was aware that the documents had been ordered to be produced.

On May 16, 1978, Respondent filed a Motion for Sanctions, pursuant to Rule 37 (b)(2), Arizona Rules of Civil Procedure. The Motion requested that Petitioner's Answer be stricken and judgment by default be entered against Petitioner. Petitioner opposed that Motion again for the reason that the documents were unavailable or were not within Petitioner's control. On May 23, 1978, the trial court granted the Motion for Sanctions, struck the Answer of Petitioner and ordered that the trial be limited solely to the issue of the amount of damages sustained by Respondent. No other sanctions were imposed.

Trial commenced on May 24, 1978 before a jury. The jury returned a verdict in

favor of Respondent and against Petitioner in the amount of $150,000.00 compensatory damages, and $20,000.00 punitive damages, and judgment was entered thereon.

Petitioner appealed from the judgment, in part, because the decision of the trial court to strike its Answer deprived it of property without due process of law, in violation of its rights under the Fourteenth Amendment to the United States Constitution. The judgment of the trial court was affirmed by the Court of Appeals of the State of Arizona, Division Two. Motion for Rehearing, filed by Petitioner, was subsequently denied by the Court of Appeals. Thereafter, a timely Petition for Review was filed, and the Supreme Court of Arizona denied the Petition for Review on July 17, 1979.

REASON FOR GRANTING THE WRIT

THE DECISION BELOW DENIED PETITIONER ITS RIGHT TO DUE PROCESS OF LAW CONTRARY TO THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE OPINION OF THIS COURT IN SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES v. ROGERS, 357 U.S. 197 (1958).

Review of the decision below will provide this Court with the opportunity to hold that the decision of a state court to deny a litigant the opportunity to present his case, as a sanction for the failure to comply with an order compelling discovery pursuant to state rules of procedure must be made within the boundaries set by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. That restriction has been applied to the application of sanctions under the Federal Rules of Civil Procedure. See, Societe Internationale Pour Participations Industrielles et Commerciales v. Rogers, 357 U.S. 197 (1958). However, this Court has

has never previously ruled that there are constitutional limitations on the power of state courts to strike a litigant's pleading because of the litigant's failure to comply with a discovery order and to thereby deny a litigant the opportunity for a hearing on the merits of its cause. This case provides this Court with the opportunity to so rule.

This Court has ruled that federal courts cannot strike a party's pleading because of the party's noncompliance with a pretrial discovery order when the failure to comply has been due to inability and not to willfulness, bad faith or any fault of the noncomplying party. Id. Review of the decision below will also provide this Court with the opportunity to apply the same standard to state court proceedings.

Rule 37 of the Arizona Rules of Civil Procedure is modeled after and identical to Rule 37 of the Federal Rules of Civil Procedure. Like its federal counterpart, it empowers a court, among other actions, to strike a party's pleading as a sanction for the failure to comply with a discovery order. On appeal to the Court of Appeals

of the State of Arizona, Petitioner argued that the application of sanctions pursuant to Rule 37 of the Federal Rules of Civil Procedure is limited by the Due Process Clause of the Fifth Amendment to situations where the noncompliance was willful or in bad faith, as set forth by this Court in Societe Internationale; Petitioner further argued that the same standard should be applied to control the actions of state courts.

The response to this argument by the Court of Appeals was complete silence. By its silence, the decision of the Court of Appeals of the State of Arizona appears to have rejected or ignored the standard set by this Court in Societe Internationale. In pertinent part, the Court of Appeals ruled that the decision to strike Petitioner's Answer was proper because the requested documents were material and because Petitioner failed "either to produce them or to seek relief a reasonable time before trial from the order compelling their production ...." That rationale permits a court to dismiss a plaintiff's Complaint or to strike a defendant's Answer for noncom-

pliance with a discovery order even when the noncomplaince was caused by the litigant's inability to comply. All that the adverse party must show is that the requested discovery was material, that the order was not complied with and that, other than repeated opposition to its issuance, no relief from the discovery order was requested. That rationale ignored the facts in this case and similarities between the facts in this case and those in Societe Internationale.

On no fewer than five occasions, spanning more than a year, Petitioner or its attorneys protested that the requested documents were unavailable and could not be produced. Approximately one week after respondent filed its Request to Produce, the president of petitioner testified at his deposition that he doubted that petitioner possessed the documents. This position was reiterated and amplified by petitioner, through its attorney, in its legal response to the Request to Produce. It was explained a third time at the hearing on the Motion to Compel Discovery. In a pleading filed by petitioner after its counsel had

withdrawn, the president of petitioner stated a fourth time that it was unable to produce the requested document. Finally, in an affidavit presented to the trial court at the hearing on the Motion for Sanctions, the president of petitioner avowed that the documents were unavailable. (Although the latter affidavit was reviewed by the trial court, it was not made a part of the record on appeal; petitioner's Motion to Enlarge the Record to include the affidavit was denied by the Court of Appeals of the State of Arizona, Division Two.) That evidence shows neither a willful disregard of a court order, nor bad faith. Rather it shows petitioner's "inability, despite good-faith efforts, to comply with a pretrial production order." Societe Internationale, supra, 357 U.S. at 210. The decision of the trial court to strike petitioner's Answer in the face of this evidence raises "substantial constitutional questions ...." Id.

In many ways, this case presents a factual situation and a denial of due process as compelling as that which confronted this Court in Societe Internationale. In

Societe Internationale, as in the instant case, the lower court had ruled that the requested documents were material and were in the control of the petitioner. It is worth noting, however, that in this case most of the requested documents (e.g. those concerning revenues received and audience attendance) were material primarily to the amount of damages, the only issue which the trial court permitted to be litigated. In Societe Internationale, the evidence established that the requested documents were not produced because of difficulties with the application of Swiss law. In the instant case, from the time the president of petitioner was deposed until the time that the Answer filed by petitioner was stricken, the evidence established that the documents could not be produced because they could not be located. In Societe Internationale, this Court ruled that dismissal was improper because "petitioner's failure to satisy fully the requirements of this production order was due to inability fostered neither by its own conduct nor by circumstances within its control." 357 U.S. at 211. The evidence sustains the

same conclusion in the instant case. Accord, Wilson v. Volkswagen of America, Inc., 561 F.2d 494 (4th Cir. 1977) cert. denied, 434 U.S. 1020 (1978); Kropp v. Ziebarth, 557 F.2d 142 (8th Cir. 1977).

The determination whether or not imposition of judicial sanctions for noncompliance with a discovery order offends the concept of due process of law requires consideration of the competing interests involved. Clearly, a major interest governing that determination is the opportunity afforded a litigant for a hearing on the merits of its case. No one can question that a person's right to have his or her day in court is a fundamental right. See, Goldberg v. Kelly, 397 U.S. 254 (1970); Hopewell Township v. Volpe, 446 F.2d 167 (3rd Cir. 1971); cf., Wardius v. Oregon, 412 U.S. 470 (1973). The decision below to strike Petitioner's Answer denied it a meaningful day in court. Instead of litigating whether or not it was liable for the payment of damages, Petitioner was reduced to arguing the amount of damages it would have to pay. The justification for that

infringement was that Petitioner had to be penalized for its failure to comply with the discovery order. The decision of the Court of Appeals of the State of Arizona authorizes such harsh penalties whenever the requested information is material, the requested information is not provided and the party ordered to provide the information, even though it has opposed the order and is unable to provide the information, fails to seek other relief from the order. The decision of the Court of Appeals does not limit the imposition of the harsh sanction used in this case to situations where there was a willful or bad faith refusal to comply with the court order. Yet the raison d'etre for the imposition of a penalty which deprives a litigant of its day in court exists only so long as disobedience of the court order is willful or in bad faith. Otherwise, a party would be penalized not for its refusal to act but rather for its inability to act.

To allow the decision below to stand will suggest that the Due Process Clause does not limit a state court's power to

strike a litigant's pleading for the failure to obey a discovery order. That suggestion flies in the face of the decision of this Court in Societe Internationale and the Constitution of the United States.

CONCLUSION

For this reason, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals of the State of Arizona, Division Two.

Respectfully submitted,

LAW OFFICES OF KLEIN & KLEIN

Donald S. Klein, Esquire
903 Pioneer Plaza Building
100 North Stone Avenue
Tucson, Arizona 85701
Counsel for Petitioner

APPENDIX

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

Gilbert Veliz JUDGE	No. 153648 Date May 23, 1978
Fenster School PLAINTIFF	James Figiulo PLAINTIFF'S ATTORNEY
National Student Film Corp. DEFENDANT	Mark Collins DEFENDANT'S ATTORNEY

Pre-Trial Motions: MINUTE ENTRY

Parties not present.

Chris Graham reporting.

Mr. Figliulo makes statements to the Court.

As to defendant's motion to continue:

Counsel argue to the Court.

Filed In Court: Original letter dated May 10, 1978.

It Is Ordered that the motion to continue is Denied.

As to plaintiff's motion to amend complaint:

Counsel argue to the Court.

Plaintiff's Exhibit 1, being an original pleading (proof of prior notice), is identified.

It Is Ordered both the plaintiff and the defendant are given leave to amend their complaint and answer for the purposes of alleging a demand for attorney's fees pursuant to A.R.S. § 12-341.01.

As to plaintiff's motion for sanctions:

Counsel argue to the Court.

By/s/ Val Phillips
Deputy

MINUTE ENTRY

Page no. 2 Date May 23, 1978

Case No. 153648

Plaintiff's Exhibit 2, being a copy of a letter dated April 11, 1978 is identified.

Plaintiff's Exhibit 3, being a copy of a letter dated August 4, 1977, is identified.

11:10 a.m.

Chris Graham is again reporting.

The Court makes statements for the record.

Plaintiff's Exhibit 4, being an original letter dated April 12, 1978, is identified.

The Court takes the matter under advisement.

It Is Ordered that the hearing is continued until 1:30 p.m. this date.

1:38 p.m.

Same Counsel present.

Chris Graham reporting.

Counsel make statements to the Court.

Based upon the fact that the Court thinks the failure to produce the proposed documents goes to the very essence or core of the plaintiff's case, to wit, specifically when speaking about the location contracts being central to the issue of the alleged fraudulent promise count and the location contracts would also go to the issue of whether or not these, in fact, were "boiler-plates" so as to raise the defense as to whether there was a promise on the contract count, and both of those being central to the issues scheduled to be tried at this time; the documents not having been produced and the Court having indicated for the record prior

By/s/ Val Phillips
Deputy

MINUTE ENTRY

Page No. 3 Date May 23, 1978

Case No. 152648

to this time that it seems a late date in the proceedings to be stating for the record that this material is not available, when the Court ordered a production of same 11 months ago;

The Court feels there has been a failure to comply with the spirit and letter of the law in complying with discovery and production as indicated by case law and Rules of Civil Procedure.

It Is Ordered that the portion of the answer dealing with those two issues be stricken and the only issue remaining is what damages, if any, are to be assesed for the alleged breaches of tort and contract law and punitive damages.

Counsel make statement to the Court.

It Is Ordered that the matter be continued for jury trial on May 24, 1978, at 9:30 a.m. in division II.

cc:
Miller, Pitt & Feldman-James Figliulo
Risner, Raven & Keller-Mark Collins
Court Administrator
Hon. Gilbert Veliz

By/s/ Val Phillips
Deputy

MILLER, PITT & FELDMAN, P.C.
ATTORNEYS AT LAW
111 South Church Avenue
TUCSON, ARIZONA 85701
(602) 792-3836
ATTORNEY FOR PLAINTIFF

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

FENSTER SCHOOL, an Arizona corporation, Plaintiff,	)	No. 153648
vs.	)	
NATIONAL STUDENT FILM CORPORATION, A California corporation, Defendant.	)	JUDGMENT

The above entitled cause came on regularly for trial before a judge and jury on the 23rd, 24th, 25th and 26th day of May, 1978, both parties appearing by counsel;

And, the jury having heard the testimony, examined the exhibits, and having been instructed on the law;

And, the cause having been submitted to the jury for its decision, and the jury

having arrived at its verdict in favor of the Plaintiff, Fenster School, and against the defendant, National Student Film Corporation; and assessed damages in the amount of $150,000.00 for compensatory damages and $20,000.00 for punitive damages;

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

1. That plaintiff, Fenster School, have judgment against the defendant, National Student Film Corporation, upon Counts II and III of its Amended Complaint in the total amount of $150,000. compensatory damages and $20,000. punitive damages.

2. The Court expressly determines that there is no just reason for delay in the entry of the judgment, and the clerk is directed to enter judgment forthwith.

3. That plaintiff, Fenster School, have judgment against defendant, National Student Film Corporation, for plaintiff's costs, attorneys' fees to be determined at a hearing to be set by the Court, together with interest on the entire judgment at the rate of 6% per annum from the date of the entry of this judgment until paid.

4. That the injunctive relief prayed for in Count I of the Amended Complaint be determined before the Court pursuant to stipulation of counsel, after hearing to be set by the court.

/s/ Gilbert Veliz
Judge of the Superior Court

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

FENSTER SCHOOL, an Arizona corporation,	)	
Plaintiff,	)	No. 153648
vs.	)	
NATIONAL STUDENT FILM CORPORATION, A California corporation,	)	JUDGMENT FOR JURY FEES
Defendant.	)	

The above-entitled action coming on regularly to be heard, and the matter having been tried to a jury and its verdict returned in favor of the Plaintiff, Fenster School, and against the defendant, National Student Film Corporation;

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREE

that the Clerk of the Superior Court of Pima County, Arizona, have Judgment against the Defendant, National Student Film Corporation, A California corporation, in the amount of $444.00 for three days jury fees.

DONE this 12th day of June, 1978.

/s/ Gilbert Veliz
GILBERT VELIZ
Judge of the Superior Court

MILLER, PITT & FELDMAN, P.C.
ATTORNEYS AT LAW
111 South Church Avenue
TUCSON, ARIZONA 85701
(602) 792-3836
ATTORNEY FOR PLAINTIFF

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

FENSTER SCHOOL, an Arizona corporation,	)	
Plaintiff,	)	No. 153648
vs.	)	
NATIONAL STUDENT FILM CORPORATION, a California corporation,	)	JUDGMENT
Defendant.	)	

This cause came on for hearing by the Court without a jury on June 12, 1978. Plaintiff was represented by Miller, Pitt & Feldman, P.C. Defendant was represented by Risner, Raven & Collins. The Court having heard testimony and received exhibits and listened to arguments of counsel,

IT IS HEREBY ORDERED, that Plaintiff, Fenster School, have judgment against defendant, National Student Film Corporation, for attorneys' fees in the sum of $8,000.00.

There is no just reason for delay in the entry of judgment and the Court directs the Clerk to enter judgment forthwith.

DONE IN OPEN COURT this 15th day of June, 1978.

/s/ Gilbert Veliz
Judge of the Superior Court

Copies of the foregoing mailed this 13th day of June, 1978 to:

RISNER, RAVEN & COLLINS
Transamerica Building
Tucson, Arizona 85701

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FENSTER SCHOOL, an Arizona corporation,	2CA-CIV 3103
Plaintiff/Appellee,	MEMORANDUM
v.	DECISION
NATIONAL STUDENT FILM CORPORATION, a California corporation,	Not for Publication-Rule 48, Rules of the Supreme Court
Defendant/Appellant.	

Appeal from the Superior Court of Pima County
Honorable Gilbert Veliz, Judge
Cause No. 153648
AFFIRMED

Miller, Pitt & Feldman, P.C.
by James R. Figliulo
Attorneys for Plaintiff/Appellee Tucson

Klein and Klein
by Donald S. Klein
Attorneys for Defendant/Appellant Tucson

RICHMOND, Chief Judge

National Student Film Corporation appeals from a judgment awarding compensatory and punitive damages to Fenster School in an action for breach of contract and fraud. National raises three issues:

1. Was National deprived of due process when the trial court granted Fenster's motion for sanctions and struck National's answer?

2. Did the trial court abuse its discretion in denying National's motion for a two-week continuance?

3. Was the award of damages sustained by the evidence, or so unreasonable and outrageous as to shock the conscience of the court?

We find no error requiring reversal.

The granting of the motion for sanctions and denial of the motion for a continuance occurred on May 23, 1978, the day the trial was to commence. The trial had been postponed six times previously. More than 11 months earlier, on June 6, 1977, National had been ordered to produce certain documents, including all other

contracts similar to the one at issue. By letter dated August 4, 1977, counsel for Fenster asked the attorney then representing National to comply with the order for production. In October National's attorney was permitted to withdraw as counsel of record on a motion supported by his affidavit which stated in part that National had failed to produce documents pursuant to court order. In November National's president, in a letter to the clerk of the court requesting a continuance, represented that "the materials requested by the Court ... are simply not in existence, and cannot be produced." Neither then nor at any time prior to trial, however, did National make an appropriate request for relief from the order compelling production.

On February 2, 1978, new counsel filed a notice of appearance on behalf of National. By letter dated April 11, Fenster's attorney informed National's trial attorney that a motion for sanctions would be forthcoming if the documents were not produced within 10 days. On May 10 National's trial

attorney filed a motion to continue without any reference to the unsatisfied order for production. The motion was denied from the bench on May 11. On May 16 Fenster filed its motion for sanctions. On May 22, with trial scheduled to begin the following day, National again filed a motion to continue, together with its opposition to the motion for sanctions. The motion to continue, like its immediate predecessor filed May 10, was based on the absence of National's president who was attending settlement conferences in other litigation in California. The motion for sanctions was opposed on the basis that the materials were unavailable, having either been inadvertently thrown away or destroyed by flood, or being outside National's control.1/

1/ The opposition to the motion for sanctions and National's counsel in argument before the trial court referred to an affidavit of National's president that does not appear in the record.

Both the imposition of sanctions for failure to comply with an order compelling discovery and the denial of a motion for continuance are within the sound discretion of the trial court. Furrh v. Rothschild, 118 Ariz. 251, 575 P.2d 1277 (App. 1978); Nordale v. Fisher, 93 Ariz. 342, 380 P. 2d 1003 (1963). The materiality of the other contracts on Fenster's theories of liability was undisputed, and National's failure either to produce them or to seek relief a reasonable time before trial from the order compelling their production justified the extreme sanction imposed. The trial judge suggested during argument that he would entertain any explanation that National's president might offer in testimony on the motion for sanctions but counsel reported after a recess that the president had told him by phone he would be unavailable until the following week. In view of the numerous postponements and protracted unavailability of National's president, denial of the motion to continue also is supported by the record.

Having failed to challenge the suffic-

iency of the evidence in its motion for new trial, National is precluded from seeking appellate review on that ground. A.R.S. § 12-2102 (C). Likewise, any attack on the size of the judgment was waived by failure to object to testimony supporting an even larger award. City of Tucson v. Wondergem, 105 Ariz. 429, 466 P. 2d 383 (1970).

Affirmed.

JAMES L. RICHMOND, Chief Judge

CONCURRING:

LAWRENCE HOWARD
Judge

JAMES D. HATHAWAY
Judge

SUPREME COURT
STATE OF ARIZONA
201 WEST WING
CAPITOL BUILDING
PHOENIX, 85007 July 18,1979

FENSTER SCHOOL, an Arizona corporation, Appellee,	) Supreme Court No. 14421-PR
v.	) Court of
NATIONAL STUDENT FILM CORPORATION, a California corporation, Appellant.	) Appeals No. 2CA-CIV 3103
	) Pima County No. 153648

The following action was taken by the Supreme Court of the State of Arizona on July 17, 1979 in regard to the above-entitled cause:

"ORDERED: Petition for Review=DENIED."

Record returned to the Court of Appeals, Division Two, Tucson, this 18th day of July, 1979.

MARYANN HOPKINS-YOUNG, Clerk
by /s/ Becky Sanchez
Deputy Clerk

TO:

Donald S. Klein, Klein & Klein, 100 North Stone Avenue, Suite 903, Tucson, Arizona 85701

James R. Figliulo, Esq., Miller, Pitt & Feldman, 111 South Church Avenue, Tucson, Arizona 85701

Hon. Gilbert Veliz, Judge, Pima County Superior Court, Pima County Courthouse, Tucson, Arizona 85701

Elizabeth Urwin Fritz, Clerk, Court of Appeals, Division Two, 415 West Congress, Tucson, Arizona 85701